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Paper No. 13  
DEB

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Pacer Technology

Serial No. 75/477,402

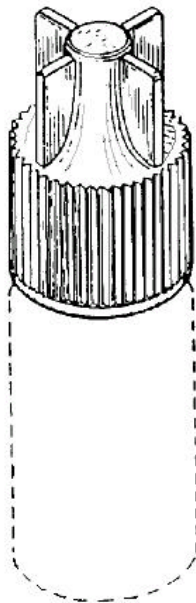
Thomas E. Schatzel for Pacer Technology.

Marc J. Leipzig, Trademark Examining Attorney, Law Office  
115 (Tomas V. Vlcek, Managing Attorney).

Before Simms, Hairston and Bucher, Administrative Trademark  
Judges.

Opinion by Bucher, Administrative Trademark Judge:

Applicant seeks to register the following design  
configuration on the Principal Register:



for "epoxy glue for general bonding and repair purposes, for bonding metal, rubber, plastics, ceramics, fingernails and jewelry,"<sup>1</sup> in International Class 1. The record contains the following description of the alleged mark:

The mark consists of the shape of the package in which the goods are sold. A container cap with four equally spaced flat wings projecting laterally from a concaved crown and with each wing forming two intersecting exterior edges projecting at right angles relative to one another with each edge intersecting the concaved crown. The material [in] dotted lines is not part of the mark and is used to show positioning of the mark only. The middle portion of the package shape, consisting of the vertical ridges contiguous with the surface below the four wings and the concaved crown is not part of the mark. The lining and stippling shown in the drawing denotes surface shading and is not intended to indicate color.

The Trademark Examining Attorney has refused registration under Sections 1, 2 and 45 of the Act, 15 USC §§1051, 1052 and 1127, on the ground that the configuration in question does not function as a trademark to indicate origin of applicant's goods. He argues that the asserted mark lacks inherent distinctiveness and that even if we should find that the issue of acquired distinctiveness was

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<sup>1</sup> Application Serial No. 75/477,402 was filed on April 30, 1998 based upon a claim of use in interstate commerce since at least as early as September 1982.

tried herein, the documentation submitted in support of such acquired distinctiveness is insufficient.

Applicant appealed the final refusal. The case was fully briefed by applicant and the Trademark Examining Attorney. At applicant's request, an oral hearing was held before the Board.

The major issue, as briefed by applicant and the Trademark Examining Attorney, and as argued at the oral hearing, is whether applicant's asserted mark is inherently distinctive. Specifically, we must decide whether potential purchasers will immediately recognize applicant's winged cap, as used on an applicator for one of its products, as a distinctive way of identifying the source of its enumerated goods.

Applicant takes the position that the claimed design configuration is an inherently distinctive symbol integrated into the packaging for the product, not unlike "the symbol extending from the hood of Mercedes cars."

In response, the Trademark Examining Attorney argues that this alleged mark is a simple design attribute of applicant's product packaging. He points to copies of a number of design patents placed into the record involving caps for adhesive product containers which caps contain winged features similar to those in applicant's claimed

mark. Essentially, it is the Trademark Examining Attorney's position that applicant's asserted mark consists of minor variations on common designs of adhesive product applicator caps without any origin-indicating significance.

Our primary reviewing court has stated that, in determining whether a design is inherently distinctive, it:

has looked to whether it was a "common" basic shape or design, whether it was unique or unusual in a particular field, [or] whether it was a mere refinement of a commonly-adopted and well-known form of ornamentation for a particular class of goods viewed by the public as a dress or ornamentation for the goods[.]

See Seabrook Foods, Inc. v. Bar-Well Foods Ltd., 568 F.2d 1342, 196 USPQ 289, 291 (CCPA 1977); and Tone Brothers Inc. v. Sysco Corp., 31 USPQ2d 1321, 1331 (Fed. Cir. 1994).

The Trademark Examining Attorney argues that it is fairly intuitive that the winged cap for this applicator allows for easy opening/closing and friendly handling. Applicant has admitted that the wings with their attendant "slots" provide a means for gripping the cap.<sup>2</sup>

Going beyond intuition, the Trademark Examining Attorney has made of record a number of design patents showing a variety of adhesive product container caps having

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<sup>2</sup> By contrast, we suspect that the Mercedes logo *qua* hood ornament is not designed to assist with easier opening of the hood of these luxury automobiles!

a pointed crown covering the tip of the applicator and then having two, four or six evenly spaced wings around the crown. Applicant's competitors are listed among the assignees on several design patents for these adhesive containers having similar winged caps.

While applicant is correct that these patent documents do not show actual use in commerce, they are probative of the fact that consumers are not likely to find applicant's claimed feature (wings arrayed evenly around a pointed crown) to be at all unique, original or peculiar in appearance. Upon careful consideration of the material in this record judged by the Seabrook criteria, it is our opinion that these wings are not at all unusual in this field. The factual record herein stands in stark contrast to cited cases where the claimed trademark matter has an "original, distinctive, and peculiar appearance."

Rather, the Trademark Examining Attorney has demonstrated that this winged cap configuration is, at best, a variation or "mere refinement" of a useful, basic design scheme for adhesive product applicator caps. As such, purchasers would not immediately recognize or perceive applicant's asserted mark as a source indicator. That is to say, in the best case for applicant, purchasers and prospective purchasers would view this winged cap as a

slightly different winged/slotted cap than that found on other adhesive product containers.

In spite of the fact that the Trademark Examining Attorney was unable to show that a winged cap similar to applicant's particular design is found on competitors' adhesive product applicators available in the marketplace, this does not necessarily mean that applicant's asserted mark is inherently distinctive. For example, an earlier Board case, In re E S Robbins Corp., 30 USPQ2d 1540 (TTAB 1992), involved the configuration of a floor mat for use under chairs. As in the instant case, the applicant therein argued that its asserted mark was "unique" because there was no evidence that others used the *identical* configuration for their floor mats. However, there was evidence showing uses of similar third-party chair mats. The Board concluded that the design was not unique in the sense that it was "original, distinctive, and peculiar [in] appearance." The Board commented that, if inherent distinctiveness meant simply "one and only," then one could obtain a registration which differed only slightly from the designs of other competing products. See In re McIlhenny Co., 278 F.2d 953, 126 USPQ 138, 140-141 (CCPA 1960).

As a secondary and subordinate matter, applicant argues in its brief that this matter has actually acquired

distinctiveness as a source indicator, and hence, should be registered on that alternative basis. However, we agree with the Trademark Examining Attorney that the majority of the prosecution of this application was directed to the dispute over whether this matter is inherently distinctive. While it is true that three of the five form declarations herein were submitted early in the prosecution of the application, applicant's tardy reliance on acquired distinctiveness is a position that was never articulated until the time of the appeal brief.

On the other hand, even if we were to consider applicant's alternative position, the evidence in the file is deemed insufficient to support this allegation. Because of the relatively nondistinctive nature of the asserted mark, the level of proof needed for acquired distinctiveness is substantially higher than if the features were more unusual in nature. In this regard, what our primary reviewing court stated in In re Water Gremlin Company, 635 F.2d 841, 208 USPQ 89, 91 (CCPA 1980), in the context of a holding of functionality, is noteworthy with respect to applicant's asserted mark and its lack of distinctiveness:

On the other hand, a merchant who wishes to set himself apart has no dearth of means to do so. One who chooses a commonplace design

for his package, or one different from competitors only in essentially functional features, even if he is the first to do so, must expect to have to identify himself as the source of goods by his labeling or some other device.

Furthermore, we find nothing in the record to suggest that applicant has explicitly promoted the asserted mark herein as a trademark. In fact, we have absolutely no indication that applicant has ever even mentioned the asserted mark in its product advertisements.

Moreover, at oral argument, the Trademark Examining Attorney pointed to the specimens of record in this case. The primary specimen is a colorful advertising flyer, the front side being a full page photograph of almost thirty containers of adhesive bonding products marketed by applicant. Yet only one of these thirty containers has an applicator that conforms to the description of the mark in this application. And absent a magnifying glass, one might overlook this feature entirely. But even if the winged cap were displayed in a much more prominent manner, we find it most interesting that this one container holds a "Z-7 Debonder." According to text contained on the backside of the specimens, this is a *debonding agent* that "[s]oftens cured glue so it can be easily removed from fingers and other surfaces."



The only direct evidence in the record indicating that purchasers would view the feature in question as more than a part of the packaging for the goods comprises five form declarations containing identically worded claims. See In re Pingel Enterprise Inc., 46 USPQ2d 1811 (TTAB 1998).

Moreover, all five of these declarants appear to represent a tiny market sliver, namely, manufacturers of *artificial nail* products. It is logical that this particular sector is a specialized market for the resale of the "Z-7" debonding agent for removing glue from *fingers*. Yet none of the form declarations specifically mention Z-7 debonding agents (nor indeed would such a product even appear to be covered by the identification of goods herein).

However, the declarations refer only to the "unique" cap in the "attached drawing" for generalized "adhesive bonding products." They do not describe in any detail what it is about the design of applicant's glue applicator caps that is particularly unique. This mutes whatever distinctive potential the claimed mark has. It would have been helpful, for example, if applicant's declarations had indicated what particular feature (or features) of its asserted mark is (or are) unique or unusual. See In re Sandberg and Sikorski Diamond Corp., 42 USPQ2d 1544 (TTAB 1996).

Other than these flawed declarations, there is no evidence to support recognition of this feature as an indication of origin by the members of the general public who use epoxy glue for general bonding and repair purposes. There is no documentation to support recognition of the claimed matter as a source-indicator by the ultimate purchasers in other industries involved in the manufacture and repair of metal, rubber, or plastics goods, or of either consumers or artisans who use applicant's affected products with ceramics or jewelry.

Accordingly, given the relatively nondistinctive nature of the asserted mark, it cannot be inherently distinctive. Secondly, were we to consider it at all, the documentation submitted in support of acquired distinctiveness herein is most insufficient.

Decision: The refusal of registration is affirmed.